

**G. Silverman Declaration
Exhibit 2**

1 UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF NEW YORK

3
4 JASON WEMES,

5 Plaintiff,

6 vs. Civil Action No. 6:22-cv-06297

7 THE CANANDAIGUA NATIONAL BANK

8 & TRUST COMPANY,

9 Defendant.
10

11
12 This is the Videotaped Examination of
13 **MATHEW NIELSEN**
14 taken on Tuesday, April 23, 2024, held
15 REMOTELY via ZOOM, commencing at
16 9:03 a.m., concluding at 10:29 a.m.,
17 taken before Tonia L. Tinker, Court
18 Reporter and Notary Public in and for
19 the State of New York.
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1 **FEDERAL STIPULATIONS:**

2

3 IT IS HEREBY STIPULATED AND AGREED by and

4 between the attorneys for the respective parties

5 hereto that this deposition may be taken by Counsel

6 for Plaintiff at this time;

7 IT IS FURTHER STIPULATED, that all objections

8 except as to the form of the questions and

9 responsiveness of the answers be reserved until the

10 time of the trial;

11 IT IS FURTHER STIPULATED, that pursuant to

12 Federal Rules of Civil Procedure 30(3)(1) the

13 witness requests to review the transcript and make

14 any corrections to same before any Notary Public;

15 IT IS FURTHER STIPULATED, that if the original

16 deposition has not been duly signed by the witness

17 and returned to the attorney taking the deposition

18 by the time of trial or any hearing in this cause, a

19 certified transcript of the deposition may be used

20 as though it were the original;

21 IT IS FURTHER STIPULATED, that the attorneys

22 for the parties are individually responsible for

23 their certified transcript charges, including any

24 expedite or other related production charges.

25

1 THE STENOGRAPHER: Good morning.
2 Today is April 23, 2024. The time is
3 9:03 a.m.

4 We are about to begin the
5 videotaped deposition of Mathew Nielsen
6 in the matter of Jason Wemes v. The
7 Canandaigua National Bank & Trust
8 Company, filed in the United States
9 District Court, Northern District of New
10 York. Case Number 6:22-cv-06297. This
11 remote deposition is being taken on
12 behalf of the Plaintiff and recorded via
13 Zoom.

14 My name is Tonia Tinker of CSR
15 Court Reporting. Appearances will be
16 noted on the stenographic record.

17 I will now swear in the witness and
18 we can proceed.

19 M A T H E W N I E L S E N,
20 having been first duly sworn by a Notary
21 Public within and for the State of New York,
22 was examined and testified as follows:

23 EXAMINATION

24 BY MR. SILVERMAN:

25 Q. Good morning, Chief. How are you?

1 A. Good morning. Thank you.

2 Q. Chief Nielsen, can you state your name for
3 the record?

4 A. Mathew Nielsen, N-I-E-L-S-E-N.

5 Q. And where are you testifying from this
6 morning?

7 A. I'm testifying from my office at the City
8 of Canandaigua Police Department at 21 Ontario
9 Street in the city of Canandaigua.

10 Q. Besides Mr. Hou, who I can see, is there
11 anyone else in the room with you?

12 A. No, there is not.

13 Q. Okay. Chief, I assume that you have been
14 deposed before; is that correct?

15 A. Yes.

16 Q. So I just want to briefly go over a few
17 ground rules. If you can't hear me or understand my
18 question, please let me know and I will repeat or
19 rephrase.

20 Is there any reason you are aware of that
21 you can't provide accurate and truthful testimony
22 today?

23 A. No.

24 Q. And if you want to change your answer or
25 add to it, you can do so at any time during this

1 deposition. And if you need a break, please let me
2 know and we will take one, okay?

3 A. Okay.

4 Q. Without telling me what you and your
5 counsel discussed, can you tell me how you prepared
6 for this deposition today?

7 A. I just reviewed the documents that I had
8 forwarded to David Hou a few weeks back. It was in
9 response to the subpoena that I received.

10 Q. I understand. And those, my understanding,
11 consisted of an incident report and some general
12 orders; is that accurate?

13 A. Yes, and briefly some email correspondence
14 that was included in that as well. It was part of
15 the subpoena.

16 MR. HOU: Just for the record,
17 those were not provided because those
18 were communications between the chief
19 and I that he provided to me as part of
20 a package of quote, unquote, everything
21 he had. So those were attorney-client
22 privilege communications that I did not
23 forward to you.

24 MR. SILVERMAN: Thanks for the
25 clarification.

1 BY MR. SILVERMAN:

2 Q. Did you review any other documents besides
3 what you just described?

4 A. No.

5 Q. Have you -- besides your counsel, Mr. Hou,
6 have you spoken to any other individuals in
7 preparation for this deposition?

8 A. No.

9 Q. So just to clarify, you have not spoke with
10 who I understand is now retired Daniel Visingard?

11 A. No, I have not.

12 Q. I'm going to share my screen. All right.
13 So are you -- Chief, are you able to see what I
14 shared?

15 A. Yes, I can.

16 Q. Okay. Great. So I will just represent
17 that this is Exhibit 1 and I will slowly scroll
18 down. This is the deposition subpoena that I
19 provided to Mr. Hou and he graciously accepted
20 service. I also emailed this document this morning.

21 Have you seen this document before?

22 (Exhibit Number 1 was marked for
23 identification.)

24 A. I believe so. It looks like the subpoena I
25 received a few months ago.

1 BY MR. SILVERMAN:

2 Q. And, Chief, do you understand that you are
3 here to testify on behalf of the police department,
4 not yourself as an individual?

5 A. Yes, I do.

6 Q. Okay. And do you understand -- let me just
7 scroll up -- that you are here to testify regarding
8 the deposition topics laid out in the subpoena?

9 A. Yes.

10 Q. And are you the person with the CPD who is
11 most knowledgeable about the topics set forth in the
12 subpoena?

13 A. Yes.

14 Q. So, Mr. Nielsen, can you just summarize
15 your job duties as chief?

16 A. I'm the chief administrator of the police
17 department, which would be I'm responsible for the
18 budgetary expenses of the police department, budget
19 preparation, over site of the policy, development
20 and review, and just a general oversight over the
21 department operations.

22 Q. Thank you. And I understand you have been
23 designated by the police department to speak on its
24 behalf regarding the deposition topics laid out in
25 the subpoena?

1 A. Yes.

2 Q. Okay. So I would like to start, this is
3 deposition topic 13 and the general topic is the
4 police department's history and practice of engaging
5 in sting operations.

6 You will see on Page 3, Number 6, I define
7 "sting operation" as the department's conduct of
8 posing as a minor on a dating or social media app
9 for the purposes of communicating with or possibly
10 arresting individuals for potential violations of
11 any law. So that's how I define sting operation.

12 My question for you for this topic 13 is:
13 When did the department first began the practice of
14 posing as a minor on one of these social media apps
15 for the purposes of investigating or arresting
16 potential suspects?

17 A. So I've been -- my tenure started in August
18 of 2020 and that practice was in place prior to me
19 taking this position.

20 Q. Do you know how long that practice was in
21 place before you started?

22 A. The definitive date, I would say several
23 years.

24 Q. Okay. And do you know why the department
25 started engaging in these sting operations?

1 A. I do not know the -- when or why it
2 started.

3 Q. Does the department still engage in sting
4 operations like this?

5 A. We haven't since Detective Visingard
6 retired in January.

7 Q. Before Detective Visingard retired, were
8 there other members of the department who posed as
9 minors and engaged in these sting operations?

10 A. I know Detective Visingard was training a
11 newer detective on the procedures of how that is
12 done.

13 Q. Do you know if that person he was training
14 now participates in sting operations?

15 A. I'm not aware that he has since Detective
16 Visingard retired.

17 Q. Do you know, like, what precipitates or
18 what is the reason for an officer with the
19 department to start posing as a minor in a sting
20 operation?

21 A. The purpose of that is to detect people
22 that would take advantage of children in a sexual
23 way and, I guess, I -- if you can re-ask your
24 question to make sure I'm answering it properly.

25 Q. Sure. I appreciate that.

1 So I guess I'm just curious about so, you
2 know, you testified before Detective Visingard
3 retired, he would at times pose as a minor and
4 participate in these sting operations. I'm
5 wondering, like, what was the practice surrounding
6 when he would do that? Was it because he had --
7 maybe because there wasn't -- things weren't as busy
8 or did he do this every week?

9 I'm trying to understand what was the
10 impetus for doing -- or for participating in a
11 particular sting operation?

12 MR. HOU: Form. You can answer.

13 THE WITNESS: Form, I can answer?

14 MR. HOU: Yes.

15 A. Detective Visingard engaged in these
16 investigations relatively routinely. I know he was
17 more active in these investigations when he had more
18 available time based on his other assignments.
19 Maybe he had more of a lull in his action with his
20 other types of assignments, so he would spend more
21 time. Also, too, it was when opportunity presented
22 itself as such, people would engage with him on
23 certain social media platforms.

24 Q. Understood. So just to clarify, when
25 Detective Visingard or another member of the

1 department would choose to participate in a
2 particular sting operation was depended on their
3 workload; is that accurate?

4 A. Partially, yes. Some of it was also the --
5 when opportunity or people would engage them on
6 these social media sites.

7 Q. Understood. Do you know if they have,
8 like, a permanent profile up and people would
9 randomly message them or was this a situation where
10 people only messaged them if they were active
11 themselves?

12 MR. HOU: Form. You can answer if
13 you understand.

14 A. I don't fully understand the question.

15 Q. Thank you for saying that. I guess my
16 question is you said some -- at times, potential
17 suspects would message them and that's when they
18 would engage in communicating with potential
19 suspects; is that accurate?

20 A. Yes.

21 Q. And I guess my question is: Do you know if
22 there was a constant or a permanent profile up that
23 people could always communicate with?

24 A. I believe at times there was a profile they
25 would put up on certain apps -- I will call them

1 apps, social media sites. It wasn't all of the time
2 because sometimes the accounts would get deactivated
3 for various reasons, but they would design the
4 profile out to put on the social media sites when
5 they had time.

6 Q. And you said accounts would be deactivated.
7 Would these be department accounts?

8 A. No. The detective would establish a --
9 they would establish an account that they would put
10 together, it wouldn't be anything related to the --
11 I guess, have a -- I guess I'm trying to figure out
12 the wording of it. It wouldn't be something that
13 would have the police department's image or logo or
14 anything on it.

15 Q. Sure. They were posing as a minor?

16 A. Yes.

17 Q. Okay. And just to clarify, do you know
18 what apps members of the department used to
19 participate in these sting operations?

20 A. I don't know the name of all of the apps.
21 I do know Grindr was one that I had heard that they
22 were using a lot. I think that was one of the
23 primary ones. I didn't recognize a lot of the apps
24 because they were, like, chat rooms.

25 Q. Do you know if the department had, in terms

1 of a profile a member of the department would make
2 where they would pose as a minor, do you know if
3 there were multiple profiles on, for example, the
4 Grindr app or was there one main profile for the
5 department to use?

6 A. I only knew of one general profile that
7 they used. I don't believe they made several and
8 put them out there.

9 Q. Do you know the name or the identity or
10 what the profile would have been identified with?

11 A. I don't know.

12 Q. Chief, what kind of -- I'm looking at topic
13 15, "Potential criminal laws an individual could
14 violate by only communicating with you while you
15 posed as a minor during a sting operation."

16 So, again, my first question is: What
17 potential laws could a suspect violate when they
18 were communicating with a member of the department
19 who is posing as a minor?

20 A. I think just communication wouldn't be in
21 violation of a criminal law. It would routinely
22 cross the line of violation of the criminal law
23 usually with the dissemination of inappropriate
24 material to a minor, and that's usually where the
25 investigation would start.

1 Q. Sure. So I guess I'm trying to understand
2 potentially examples of when, you know, when a
3 potential suspect crosses the line into criminal
4 conduct. You mentioned sending an inappropriate
5 picture.

6 So is your testimony that by attempting to
7 meet with a -- let me strike that. Let me start
8 over.

9 So could a potential suspect cross the line
10 into criminal conduct if they affirmatively said to
11 this minor "Yes, let's meet somewhere so we can
12 engage in sexual relations"?

13 A. Can you state that question again to make
14 sure I fully understand what you're asking?

15 Q. Of course. So I'm generally trying to
16 figure out when a suspect's conduct or communication
17 can cross the line into criminality, probable cause
18 for an arrest.

19 So my question is: If a suspect who is
20 communicating with the CPD who is posing as a minor,
21 if that suspect said, "Yes, let's meet somewhere,
22 let's meet at this particular location so we can
23 engage in sexual relations," would that
24 communication be probable cause for an arrest?

25 A. I guess it's dependent on the situation. I

1 know in practice the detectives would be looking for
2 some overt act. That communication could be
3 considered probable cause, but I think the detective
4 would look for more of an overt act of actually
5 showing up at the location to display their intent.
6 It would be case dependent though. Each scenario
7 would probably have its own nuances that would make
8 them -- to develop that probable cause or reaffirm
9 it before an arrest would be made.

10 Q. Thank you.

11 A. Like I said, it would be dependent on each
12 individual scenario.

13 Q. So if a suspect was communicating with a
14 member of the department posing as a minor, if a
15 suspect said, "Yes, let's meet at this particular
16 location," and then actually showed up where they
17 said to meet, do you believe that would be probable
18 cause for an arrest?

19 A. It could be. I guess it would all depend
20 on the evidence involved in the communication, also
21 the proper identification of that person, that would
22 establish the probable cause. Based on electronic
23 communication and then verifying that the person
24 that showed up is the same person that engaged in
25 that conversation.

1 Q. What are the potential laws someone might
2 violate if there was probable cause to arrest? And
3 in this hypothetical, it's simply the suspect is
4 communicating with a member of the department who is
5 posing as a minor, they say, "Let's meet at this
6 specific location, and they actually do go there.

7 What potential laws could they violate in
8 that situation?

9 A. Well, I guess, depending on the type of
10 encounter that they agreed upon, that would be
11 dependent. It would be, you know, I think at the
12 most -- the most basic thought I have is an
13 attempted rape charge, but there's a lot of factors
14 involved in that, such as the age that's being
15 portrayed. And, you know, it could be a situation
16 of, like, attempted sex abuse depending on, like I
17 said, the nature of the -- or the elements involved
18 in each case. But there's a litany of statutes in
19 that particular sex abuse, you know, rape section of
20 the Penal Law that would apply.

21 Q. Thank you. Chief, I want to look at topic
22 14. It says, "Your history and practice of engaging
23 in sting operations in collaboration with the
24 Ontario County Sheriff's Office."

25 So my question is: Do you know when the

1 CPD might collaborate with the sheriff's office and
2 under what circumstances?

3 A. It would be routinely in any of these types
4 of sting operations. We work collaboratively with
5 them on these types of cases as well as narcotics
6 cases based on undercover personnel are limited in
7 this county. So we do rely on the Ontario County
8 Sheriff's Office and even at times the Geneva Police
9 Department depending on how many resources are
10 needed for each case that's being investigated.

11 Q. Thank you. So I guess I'm just curious
12 about how the communication with the sheriff's
13 office might happen. Like so, for example, is it
14 where someone with the CPD communicates with the
15 sheriff's office and says, "Hey, are you available
16 for a sting operation on this date," or is there a
17 more structured schedule?

18 A. It would come down to the detective and the
19 -- or our investigative division supervisor deciding
20 who they may need to assist or when. And some of
21 these happen relatively quickly depending on the
22 information that's being presented, so that's
23 usually handled, like I said, by the actual
24 detective or the supervisor in charge of the
25 investigative division.

1 Q. In June of 2021, do you know who the
2 investigative supervisor was?

3 A. It would have been Sergeant PJ Mastracy.
4 He is still the supervisor of the investigative
5 division. And if he was unavailable, it would have
6 been Lieutenant Nate Lawrence.

7 Q. Thank you. Do you know if the login
8 information for a social media app was shared with
9 the sheriff's office?

10 A. I don't know the answer to that question.

11 Q. Okay. I just want to make sure I clarify
12 also, like, for example, if the department has a
13 specific username and password for a Grindr profile,
14 for example, are you aware if that information was
15 shared with the sheriff's office at any time?

16 A. I'm not aware if that was shared, but
17 generally the police department -- we handle our own
18 affairs and investigations. The sheriff's office
19 would be requested for additional manpower for when
20 the sting took place.

21 Q. Chief, I want to go back to topic 13,
22 "History and practice of engaging in sting
23 operations." Do you know if there was any kind of
24 training that any member of the department received
25 related to these sting operations?

1 A. I'm not aware of any formalized training
2 that they had received since they have been going on
3 before my tenure. I had conversations with
4 Detective Visingard and Sergeant Mastracy in the
5 past about their workings with the district
6 attorney's office as far as criteria that they
7 needed to have in place for prosecutions to take
8 place.

9 Q. And can you tell me the substance of those
10 conversations?

11 A. Just me seeking information. As far as the
12 conversations with the district attorney's office
13 about how they were to engage in the conversations
14 and not to be -- not to be the person leading the
15 conversations in a sexual direction. In fact,
16 trying to steer the conversations away.

17 And then, leading it up to the suspect to
18 keep -- or to pursue the conversation in a sexual
19 way, but they were -- the detective was not to lead
20 that -- any conversation in that direction upon
21 their own accord.

22 Q. Understood. What was the purpose of, I
23 guess, advising officers not to -- or to steer the
24 conversation away from sexual discussions and let
25 the potential suspect bring it back there?

1 A. Well, I guess to eliminate the argument
2 that they were entrapping the suspect into criminal
3 conduct.

4 Q. Thank you. All right. Chief, I want to
5 look at deposition topic 1, the June 29th sting
6 operation. And that is defined as the sting
7 operation in Number 7 here that occurred on June 29,
8 2021 which led to the department's presence at
9 Canandaigua's National Bank's Main Street branch and
10 for you to communicate with Jason Wemes.

11 So, Chief, my question is what's the basis
12 of your knowledge about this June 29th sting
13 operation?

14 A. My basis is the incident report that was
15 drafted by Detective Visingard.

16 Q. Thank you. Do you have any other basis of
17 knowledge about the June 29th sting operation
18 besides the incident report?

19 A. I had a short conversation with Detective
20 Visingard when I first learned of the litigation,
21 which was -- I would have to refer to my notes, but
22 it was when his cell phone was submitted into
23 evidence. I think it was September of 2022. But
24 like I said, I would have to refer to my notes for
25 the more approximate date.

1 Before that, it was -- like I said, before
2 that, it was just -- I wasn't aware of all of the
3 details, other than what was written in the incident
4 report and then the short conversation I had with
5 him about the incident and the -- as far as any
6 evidence that might exist.

7 Q. Thank you. How did you learn of this
8 litigation?

9 A. I don't really remember. I think it
10 started with an email from -- David Hou had
11 forwarded me knowing if I knew of the incident at
12 hand, which I had to research. But I think that's
13 where it began.

14 Q. Thank you. And then, so my understanding
15 is that Mr. Hou informed you of the litigation and
16 then, did you have your conversation with
17 Mr. Visingard afterwards?

18 A. Yes.

19 Q. And what do you recall about the sum and
20 substance of that conversation?

21 A. I asked him if he had preserved any of the
22 communication that happened between Mr. Wemes and
23 Detective Visingard. He stated that he was unable
24 to preserve the conversation because the
25 conversation occurred within the app of Grindr and

1 it wasn't, like, a conventional text message or
2 communication outside of the app.

3 And Detective Visingard told me that
4 immediately following this sting operation that he
5 was flagged as fraudulent on the app Grindr and his
6 account was deactivated, so he was unable to
7 preserve the conversation.

8 Q. When you say -- just to clarify that, he
9 told you that his profile account on Grindr was
10 flagged by Grindr as fraudulent?

11 A. I believe that he said that somebody
12 flagged his account. I don't know if he used the
13 word fraudulent, but he said his account was flagged
14 and it was deactivated, so he was unable to preserve
15 the conversation.

16 Q. Did Mr. Visingard tell you when his account
17 was deactivated?

18 A. He told me it was right after the sting
19 operation that we are speaking about now.

20 Q. Thank you. I want to direct your
21 attention, Chief, to deposition topic 9. It says,
22 "Any requests for additional information you made to
23 Grindr concerning the June 29th sting operation."

24 Are you aware if any subpoena request for
25 information was sent to Grindr from the CPD related

1 to the June 29th sting operation?

2 A. During that conversation with Detective
3 Visingard, I asked him about that. And he stated
4 since they didn't make a criminal arrest on it at
5 the time of the subpoena, they weren't able to
6 subpoena it because they didn't make a criminal
7 arrest on it.

8 Q. Did he tell you why no arrest was made?

9 A. I don't necessarily remember exactly or the
10 exact conversation. He had discussed a small amount
11 of confusion when they were trying to locate the
12 person at the bank as the subject of the operation,
13 that they didn't realize that Mr. Wemes was the
14 target. When he originally approached one of them,
15 which subsequently, I think, unraveled the
16 investigation because they weren't aware that the --
17 well, the target became aware of their presence
18 before they realized who it was.

19 Q. Could a subpoena to Grindr after this
20 June 29th sting operation, could that have led to
21 relevant evidence related to who this suspect could
22 have been?

23 A. It's possible. Detective Visingard, in
24 that conversation, stated that he didn't believe he
25 had enough. He stated that he was confident that

1 Mr. Wemes was the target of the investigation, but
2 he stated he didn't feel he had enough probable
3 cause at that moment to make an arrest.

4 Q. Did he state why he felt he didn't have
5 sufficient probable cause?

6 A. Nothing that I remember, no.

7 Q. Okay. Could -- strike that.

8 Chief, I'm looking at deposition topic
9 number 11, "The electronic devices you use in sting
10 operations including those used for the June 29th
11 sting operation."

12 Just to clarify, the phone that you
13 referenced was placed into evidence around September
14 2021. Is it your understanding that was the phone
15 Mr. Visingard used during the June 29th sting
16 operation or was it a different phone?

17 A. Yes, if the date is correct. Like I said,
18 I'm not -- I learned about the investigation several
19 months after it actually occurred or, I guess, when
20 the litigation came about. When I had the
21 conversation with Detective Visingard about the
22 communication or the nonexistent communication, at
23 that point, I had asked him if he did the
24 communication on his phone, to which he stated yes,
25 he had.

1 And I asked him if the conversation would
2 be on the phone, he stated no, because it was in the
3 app, the Grindr app. At that point, I wasn't
4 certain if there would be a remnants of the
5 conversation on the phone, so I then purchased
6 Detective Visingard a new phone and had him submit
7 his phone into evidence just for any future
8 analyzation of it.

9 Q. Thank you. Has the department taken any
10 attempt to look at the phone and see if any
11 conversations or information related to the
12 June 29th sting operation was reserved?

13 A. No, we have not looked at the phone. I
14 left it preserved in its condition in the evidence
15 room pending a decision on how to analyze it. I
16 didn't want to any allegation of impropriety of how
17 we looked at the phone to become an issue, so it's
18 still preserved in the same condition it was placed
19 in the evidence room.

20 Q. Okay. So, Chief, I want to look at
21 deposition topic 18. This is, "Suspects
22 investigated during a sting who you believe to have
23 committed a crime but were not arrested and why."

24 So my question is: Is the department aware
25 of any other suspect, potential suspect who the

1 department believed had participated in a crime
2 related to the department posing as a minor in a
3 sting operation, but was not arrested?

4 A. Am I aware of any specific ones?

5 Q. Yes.

6 A. I'm aware of people that were targets of an
7 investigation but not arrested. Any specific ones,
8 I don't know. Detective Visingard would probably
9 have a better account of that than I would.

10 Q. Thank you. You said that you are aware of
11 some potential targets who are not arrested. Are
12 you able to tell me who those people might be and
13 why they weren't arrested?

14 MR. HOU: Objection to form.

15 Greg, are you talking about this
16 incident or just generally any sting
17 operation?

18 MR. SILVERMAN: Thank you for the
19 clarification, David. I'm looking for
20 not this sting operation, but generally.

21 BY MR. SILVERMAN:

22 Q. Any other suspects, potential suspects, who
23 the department believes had committed a crime during
24 the course of a sting operation but were not
25 arrested?

1 A. Any specific, no. I mean, in the past, we
2 have had conversations where just me generally
3 asking, you know, what happened with the case and
4 they would just give me a general observation that
5 they didn't have enough probable cause or -- but as
6 far as me asking for specifics and, you know,
7 specific names or even specific reasons why they
8 didn't make the arrest, I generally don't ask those.

9 I trust that the detective is responsible
10 enough to determine if they have probable cause or
11 not. So it's just general conversation about -- you
12 know, it's me just inquiring about, you know, the
13 general business, I guess, rather than just
14 specifics about every case.

15 Q. Thank you. If an officer believes they
16 have probable cause that they committed a crime, but
17 chooses not to arrest based on the belief that they
18 think that the charges might not hold up in court,
19 does the officer have direction not to arrest in
20 that situation?

21 A. Yes, in some cases they would based on, you
22 know, the strength of their evidence at the time.
23 And also, they a lot of times consult with the
24 district attorney's office based on the amount of
25 evidence they have and whether the district

1 attorney's office would want to pursue prosecution
2 or not.

3 Q. All right. So, Chief, I want to turn your
4 attention to Exhibit 2. So I will tell you that
5 Exhibit 2, these are the documents that Mr. Hou
6 provided me. I Bates stamped them CPD1 through 57.

7 And I want to turn your attention to, this
8 looks like, General Order 500. It starts on page
9 Bates stamped CPD32. And I want to look at -- this
10 would be Page 2 of 9, Number 6.

11 So this says, "If during the investigative
12 detention it becomes apparent that there is probable
13 cause to believe that the detainee has committed a
14 criminal offense, the detainee shall then be placed
15 under arrest and the procedures for arrest set forth
16 in this policy, including the procedures for a
17 search incident to an arrest shall then be followed
18 by the arresting officers."

19 Do you see that paragraph?

20 (Exhibit Number 2 was marked for
21 identification.)

22 A. Yes, I do.

23 Q. Can you tell me what an investigative
24 detention might consist of?

25 A. Just it could be them detaining a person

1 while they determine, for one, do they have the
2 right person or the person that's the target of the
3 investigation as well as a review of evidence to
4 determine if they established the level of probable
5 cause, over reasonable suspicion to make the arrest.

6 Q. So just to clarify, could an investigative
7 detention be an officer questioning a potential
8 suspect?

9 A. Yes.

10 Q. Can you define what you understand as
11 probable cause? Strike that. Let me ask it again.

12 Can you tell me what the definition of
13 probable cause is?

14 A. Probable cause is when you have enough
15 evidence to believe that a person has committed a
16 crime.

17 Q. So when I'm reading this policy, do you
18 believe it's accurate that if an officer is
19 questioning a potential suspect and they believe
20 that there is probable cause then this general order
21 says they must arrest the suspect?

22 A. Can you state that question again?

23 Q. Sure. I guess I'm just trying to summarize
24 an understanding of Paragraph 6 on the page marked
25 CPD33. So if an officer is questioning a potential

1 suspect and they believe they have probable cause,
2 does this general order they must arrest that
3 individual?

4 A. Well, I guess if they believe they have
5 established probable cause, then they should arrest
6 a person if they detain them.

7 Q. Thank you. Okay. I want to turn your
8 attention to, this is -- I will move up -- General
9 Order 505. I'm on Exhibit 2, page Bates stamped as
10 CPD41. And I want to -- here we go. At the top of
11 Page 2 of 3, let me zoom in, it says, "No arrest
12 shall take place until the officer has completed an
13 investigation and believes that probable cause
14 exists for an arrest."

15 So my question is if -- strike that.

16 What is an officer's direction as to the
17 extent of an investigation? Like, for example, if
18 they believe that there might be probable cause, I'm
19 not sure, and there might be potential information
20 that could help them gather sufficient information
21 to make an arrest, how much discretion does that
22 officer have whether to pursue further investigation
23 or not?

24 A. If they believe additional evidence -- they
25 still need additional evidence that they believe

1 they can acquire, then they can seek that
2 information.

3 Q. Okay. I want to scroll down here, this is
4 General Order 505. This is Bates stamped at the
5 bottom CPD43. This says, on Paragraph E right here,
6 "Unarrest situations," and I'm looking at Number 2.
7 It says, "In cases of a nonarrest or anunarrest
8 incident where countermeasures have been used, the
9 officer will notify a supervisor prior to the
10 release of the subject."

11 Can I ask you, what is a -- this says "in
12 cases of a nonarrest." What is a nonarrest as this
13 policy contemplates?

14 A. Your question is what is a nonarrest?

15 Q. Right. At the top of Paragraph E it says,
16 "Unarrest situations," and then Paragraph 2 below
17 that says, "In cases of a nonarrest or anunarrest
18 incident."

19 So my question is: What's the difference
20 between a nonarrest or anunarrest incident?

21 A. Well, anunarrest would be if you have
22 taken custody of a person and then, during the
23 course of your investigation -- I guess, an example
24 could be, like, a witness recants or changes their,
25 I guess, the information they provided, which would,

1 you know, change the level of -- basically, change
2 the probable cause that you have, you would unarrest
3 a person and release them from custody.

4 And a nonarrest situation would be such as
5 if you have an investigative detention of somebody
6 and during the -- you have detained them for the
7 investigation, but then you never established -- or
8 you don't establish probable cause, then that would
9 be a nonarrest situation where one would actually be
10 taken into custody.

11 The first one would be where you actually
12 made the arrest and then you have to, basically,
13 unarrest them. Where one is you never crossed the
14 level of actually making an arrest.

15 Q. Thank you.

16 I'm going to, this is Exhibit 2, go down to
17 this is General Order 725. And I'm going to go to
18 Page 3 of 4, and Roman 7 right here says,
19 "Intelligence gathering techniques," and then it
20 says, "The following techniques shall be utilized to
21 assist the department's intelligence and gathering
22 process."

23 Number 3 is, "Conduct physical surveillance
24 of suspected criminal activity including the lawful
25 use of audio/visual monitoring."

1 Do you see that?

2 A. Yes.

3 Q. So would it be part of the department's
4 intelligence gathering process to, for example, if a
5 potential suspect was in a place where they had a
6 video monitoring or surveillance system to then
7 request access to that to allow the department to
8 determine potential information related to potential
9 criminal activity?

10 A. Can you say that question again?

11 Q. Yes, that was a longwinded one.

12 It says, "The following techniques shall be
13 utilized to assist the department's intelligence
14 gathering process."

15 Number 3 says, in part, "The lawful use of
16 audio/visual monitoring."

17 So my question is: Would it be part of the
18 department's intelligence gathering process when
19 appropriate or relevant if there are -- if a third
20 party has surveillance footage of a potential
21 suspect, would it be part of the department's
22 intelligence gathering process to request to see
23 that surveillance footage?

24 A. Yes.

25 Q. Do you know if Mr. Visingard or anyone at

1 the department requested to see surveillance footage
2 related to the June 29th sting operation from
3 Canandaigua National Bank?

4 A. I don't know.

5 Q. All right. Exhibit 2, I would like to turn
6 to, this is General Order 270, "Records Management."
7 This is -- I want to look at the page Bates stamped
8 CPD25.

9 Okay. And then, on Page 2 of 8, it says,
10 Paragraph Roman 5, "Types of report," it says, "SJS
11 incident report."

12 Do you know what SJS stands for?

13 A. I don't know the acronym, but it's issued
14 by New York State. It's a state incident reporting
15 program.

16 Q. Okay. And then, the last sentence of that
17 paragraph says, "In all cases, members document all
18 reported offenses whether made by a complainant,
19 victim, or otherwise."

20 Do you see that?

21 A. Yes.

22 Q. So would this general order -- so I guess
23 my question is about the timing of the preparation
24 of an incident report. Are incident reports
25 supposed to be created soon after the event? Is it

1 okay for an officer to wait a while? What's the
2 general practice at the department about that?

3 A. I guess the practice is to complete it as
4 soon as possible, which, depending on caseload of
5 each officer, the caseload and when events occur and
6 priority sometimes dictates how quick the actual
7 report gets completed, but it's supposed to be
8 completed as soon as possible.

9 Q. Thank you. I want to go down to the next
10 page Bates stamped CPD26, this is Roman 6-A-1, this
11 is records system components supervisor review.

12 And Paragraph 1 starts, "Upon completing
13 any report, officers shall place the report in the
14 sergeant's review tray in the sergeant's office.
15 The supervisor shall review the report for
16 completeness and accuracy.

17 So as it relates to the June 29th sting
18 operation, the policy, is it your understanding that
19 the policy would require Mr. Visingard to prepare an
20 incident report as soon as possible and then place
21 it in the sergeant's review tray for the sergeant's
22 review?

23 A. Well, the detectives are in a different
24 wing of the building. The supervisor review tray is
25 actually in a different section of the building,

1 which is typically used for the road patrol
2 officers. As far as detectives, they work out of
3 the same office, so generally that would be left in
4 the supervisor's workstation area for review.

5 Q. Got it. I'm looking at Paragraphs 2 and 3
6 down here. Paragraph 2, "Sergeants shall note on
7 the report if review by the investigative division
8 is warranted."

9 How would a sergeant determine whether
10 review by the investigative division is warranted?

11 A. This section here is typically used by the
12 road patrol.

13 Q. Oh, okay.

14 A. This is -- this would be, like, a road
15 patrol sergeant forwarding a report for the
16 investigative division to follow up on, which
17 there's a box at the bottom of the report that they
18 would acknowledge that the report is being forwarded
19 on. The investigative division -- the investigative
20 division, being this would be a self-generated type
21 of report, would handle the entire investigation.

22 Q. Thank you. So just to clarify, I'm back
23 down to CPD26, this is 4. It says, "Officers must
24 notify the sergeant/OIC of any reports that were not
25 completed prior to the end of shift."

1 So would this directive, would this apply
2 to an officer in a sting operation who was preparing
3 an incident report?

4 A. Well, this would apply more to the general
5 police officers. It's in the road patrol. The
6 detectives under the investigative division, they --
7 based on the details of their investigation, they
8 may not be able to complete investigations by the
9 end of their shift. Usually they take a lot longer
10 and that would be communicated between the detective
11 and the actual investigative sergeant as far as
12 which reports are still open and pending.

13 And as I said before, with the caseload and
14 the priority list and, you know, the work there,
15 they would have to be prioritized. It's not likely
16 that every report would be completed by the end of
17 the shift in the investigative division.

18 Q. Understood. So this is on page Bates
19 stamped CPD27, this would be 4 of 8 General Order
20 270. Paragraph 8 says, "Investigating officers do
21 not have the authority to close cases where he or
22 she believes a crime has been committed."

23 Would this provision apply to an incident
24 report completed by an officer after a sting
25 operation?

1 A. Yes. And just based on the nature of the
2 investigative office, a lot of these conversations
3 -- well, even with the road patrol, a lot of the
4 reports could be closed by a conversation with the
5 supervisor based on the evidence that they have at
6 hand and, I guess, the -- I guess possible next
7 investigative steps or ability to have any.

8 But usually, there's a conversation between
9 whatever officer or investigator and the supervisor
10 prior to the report being completed.

11 Q. All right. Chief, I'm back to CPD47. This
12 would be General Order 705, Page 4 of 7. So I'm
13 looking at, this would be, B-6, talking about case
14 status classifications. And I'm looking at the one
15 that says, "Closed-exception," in Paragraph C.

16 It says, "Closed-exception: The offender
17 has been identified and no prosecution is initiated.
18 Complainant withdrew complaint."

19 Do you see that?

20 A. Yes.

21 Q. Okay. So Mr. Visingard's incident report,
22 I will note, has case closed by exception. Would
23 that be an appropriate case status classification if
24 he did not pursue because he felt he lacked probable
25 cause?

1 A. Yes, I have seen that one used many times
2 in that scenario.

3 Q. Chief, do you know if there is any metadata
4 or a native file associated with Mr. Visingard's
5 incident report?

6 A. Metadata?

7 Q. Yeah, I'm going to scroll up here. So this
8 is what you provided, this is Bates stamped CPD1,
9 CPD2. So this is what I understand is his incident
10 report and my question is, like, is this a -- well,
11 let me ask it from the beginning.

12 How is this document created? For example,
13 are there certain, like, fields that are filled in
14 and then this report is created or does an officer
15 see this report and insert the information within
16 the report?

17 MR. HOU: Form.

18 A. I guess I'm confused to your question.

19 Q. Fair. That was a good objection, Dave, I
20 appreciate it.

21 Let me ask again. I'm wondering how --
22 just the physical process of completing an incident
23 report form. Like, is this a Word document on a
24 computer or how does an officer fill in this
25 information?

1 A. In the actual program, you enter the
2 program -- sign into the program, you have to
3 generate a new report, there's a tab for new report,
4 and then it's, basically, you fill in the tabs as
5 you go.

6 Q. So, Chief, I'm looking at Exhibit 2, the
7 incident report Bates stamped at the bottom right
8 CPD1. It says -- I'm looking at both CPD1 and 2.
9 So at the top, do you see where it says in the
10 middle, "Occurred on Tuesday, June 29, 2021"?

11 A. Yes.

12 Q. Okay. So then if I scroll down, it says,
13 right underneath this narrative section, "Date of
14 action, date written, August 17, 2021."

15 Do you see that?

16 A. Yes.

17 Q. Do you know why this incident report was
18 written a little less than two months after the
19 incident?

20 A. No, I don't.

21 Q. Would writing a report approximately two
22 months after the incident occurred, would that be
23 consistent with the department's policies and
24 procedures?

25 A. Generally, no. I guess it would depend on,

1 as I said before, caseload. And, you know, I'm not
2 certain about all of the factors involved in this
3 case as far as if there's any additional
4 investigative steps or anything like that that
5 occurred.

6 MR. SILVERMAN: Thank you. I think
7 I might be all done. Let me just talk
8 to my client briefly.

9 Do you want to take a break,
10 anyone?

11 MR. HOU: Yeah, we can take five if
12 you want.

13 MR. SILVERMAN: Let's take five.

14 THE STENOGRAPHER: We are going off
15 the record at 10:09 a.m.

16 (Brief recess.)

17 THE STENOGRAPHER: The time is
18 10:17 a.m. and we are back on the
19 record.

20 BY MR. SILVERMAN:

21 Q. Mr. Nielsen, I just have a few more
22 questions. I want to share again. Chief, can you
23 see, this would be -- I shared my screen. Can you
24 see Page 2 of the incident report marked CPD2?

25 A. Yes.

1 Q. It says, "Narrative," at the top?

2 A. Yes.

3 Q. Thank you. When was the first time you
4 viewed this incident report?

5 A. It was, I think, September of, I believe,
6 '21 when I first became aware of the litigation.

7 Q. And did you have any conversations with
8 Mr. Visingard about his preparation of this incident
9 report?

10 A. No, I think the only conversation we had
11 was about the preservation of the conversation that
12 we have already talked about.

13 Q. Did you ever speak with Mr. Visingard about
14 his decision not to arrest the potential suspect
15 named in this incident report?

16 A. Yes.

17 Q. And do you recall what was said?

18 A. It was -- you know, I just asked him about
19 his decision not to arrest and it was -- my
20 understanding is his decision not to arrest was
21 based on the -- I guess, the confusion that
22 initially took place when they encountered Mr. Wemes
23 in the hallway and whether they had just -- they had
24 some initial questions about the initial
25 identification at the scene.

1 Q. Understood. Do you know what those
2 questions were about the identification?

3 A. Just some confusion with whether they were
4 talking to the right person, the initial contact in
5 the hallway where, you know, or in a hallway where
6 they weren't certain in the initial encounter when
7 they were, I guess, looking for the right -- which
8 person they were looking for.

9 And it was after that encounter they -- the
10 initial encounter was with Mr. Wemes, but they
11 weren't sure if they had the right person and then
12 later determined that they had.

13 Q. Okay. So that, I guess, is part of my
14 question. So I want to look at this. Let's see,
15 the third full paragraph down, I will try to zoom
16 in.

17 It starts with, "Myself and Investigator
18 Bowerman ended up speaking with Jason Ingalls who is
19 the bank security manager." Then it says, "I
20 advised Ingalls of the investigation and he escorted
21 us to speak with Wemes. I note that Wemes was not
22 at his desk in another wing of the bank. I spoke
23 with Wemes and he denied ever being on the app
24 Grindr and that he didn't attempt to meet anyone."

25 So, Chief, my question is: According to

1 this incident report, Mr. Visingard is speaking to
2 Wemes about this investigation. Would that
3 constitute an investigative detention?

4 A. I guess I don't know because, you know, I
5 wasn't there. So I don't know if they just -- they
6 were just speaking in the hallway. I don't know if
7 they actually detained him or not.

8 Q. Can I ask you, what -- for example, if they
9 spoke to him alone privately, would that, in your
10 mind, be considered an investigative detention?

11 A. No.

12 Q. And what would make -- I guess, what would
13 cause speaking to somebody privately -- or strike
14 that.

15 If an officer speaks to a potential suspect
16 alone privately, what might make that an
17 investigative detention?

18 A. If the person was free to leave or not.

19 Q. And are you aware of the -- how it's
20 determined whether someone is free to leave or not?

21 A. Well, it could be several ways whether if
22 they detain them in handcuffs or if the person tries
23 to leave and they tell them they can't leave at that
24 moment, if they were secured in a police car. All
25 of that could be factors whether they were actually

1 in an investigative detention. It's not just one
2 thing, it could be several things.

3 Q. Understood. If a police officer says, "I
4 would like to speak with you about my
5 investigation," and that person consents to speaking
6 with the officer, would that be considered an
7 investigative detention?

8 A. No.

9 Q. All right. I want to note, so the same
10 third full paragraph, so Mr. Visingard said he spoke
11 with Wemes, and then he writes, "I note a couple of
12 things in regard to Wemes. During my text message
13 conversation, Wemes sent me a picture of his lower
14 body. In the picture, I could see a lanyard with an
15 ID. I note that the lanyard had a string attached
16 to it on the ID. While I spoke with Wemes, I
17 observed the same lanyard, same ID, and exact same
18 string on the ID."

19 So, Chief, I know you weren't there, but
20 hypothetically, if this potential suspect sent
21 Mr. Visingard a picture where their identification
22 was showing and that officer saw the exact same ID,
23 same lanyard, and same string on the ID, do you
24 believe that could be considered probable cause to
25 arrest?

1 A. Not necessarily because, you know, multiple
2 people could have that, I guess. You know, I don't
3 know what the bank issues for those. If it was a
4 bank ID, I don't know -- I guess I don't know what
5 is really issued to each employee, so I have no
6 idea.

7 Q. Okay. I want to look at the last sentence
8 here, it says, "I advised both Hernandez and Ingalls
9 that there was no doubt in my mind that I was, in
10 fact, communicating with Wemes, but I didn't have
11 enough to charge him."

12 Do you see that?

13 A. Yes.

14 Q. Would Mr. Visingard's use of charge here,
15 would that -- would you interpret that as arrest?

16 A. No, because I guess I don't know all of the
17 evidence that he had at that moment.

18 Q. Sure. I guess I'm just asking you to --
19 because I'm confused -- well, I would like some
20 clarification about the word "charge" used in this
21 last sentence.

22 A. Okay. You are referring to the word
23 charge?

24 Q. Yes. So when Mr. Visingard says, "I didn't
25 have enough to charge him," do you interpret that as

1 I didn't have enough to arrest him?

2 A. That would be my interpretation, yes.

3 Q. And if there was no doubt in
4 Mr. Visingard's mind that Mr. Wemes was the suspect,
5 would that be considered probable cause to arrest?

6 A. Can you say that question again?

7 Q. Yes. He says in this last sentence, "I
8 advised both Hernandez and Ingalls that there was no
9 doubt in my mind that I was, in fact, communicating
10 with Wemes."

11 So my question is: If this -- if
12 Mr. Visingard had no doubt in his mind that he was
13 communicating with Mr. Wemes on this Grindr app,
14 would Mr. Visingard's representation that he had no
15 doubt that he was communicating with Mr. Wemes,
16 would that be considered probable cause sufficient
17 to arrest Mr. Wemes if Mr. Visingard had no doubt he
18 was communicating with Mr. Wemes?

19 A. I guess I would have to say yes, but it
20 would also be dependent on the, I guess, the
21 elements that the district attorney's office would
22 need to follow through with the prosecution. I
23 don't know what conversation or which criteria from
24 the DA's office, what had come into play there. I
25 guess I don't have enough information.

1 Q. After you spoke with Mr. Visingard about
2 this incident report around September 2021, did you
3 ever speak with him after that about this incident?

4 A. Not that I remember, no. I don't think so.

5 Q. Okay.

6 A. I will take that back, I did speak to him
7 about if he had any communication with the people at
8 the bank that were listed on the subpoena as far as
9 email or text messages or anything. That was when I
10 was, I guess, going through the subpoena there to
11 try to find out, you know, if anyone had any
12 conversation regarding this case that I could
13 preserve.

14 Q. And what did he say?

15 A. He said, "No." And I did verify that by
16 going through the email server and I could not find
17 any conversation between Detective Visingard and the
18 people at the bank regarding this case.

19 MR. SILVERMAN: Okay. I have no
20 further questions. We can go off the
21 record.

22 THE STENOGRAPHER: The time is
23 10:29 and we are off the record.

24 (The deposition of Mathew Nielsen
25 was concluded.)

1 **CERTIFICATION:**

2 STATE OF NEW YORK

3 COUNTY OF STEUBEN

4 I, TONIA L. TINKER, the officer before whom the
5 foregoing deposition was taken, do hereby certify
6 that the witness whose testimony appears in the
7 foregoing deposition was duly sworn by me.

8 I further certify that the testimony of said
9 witness was taken by me in Stenotype and thereafter
10 reduced to typewriting under my supervision.

11 I further certify that the said deposition
12 constitutes a true record of the testimony given by
13 said witness to the best of my ability.

14 I further certify that the said deposition was
15 taken before me at the time and place specified in
16 the notice.

17 I further certify that I am neither counsel
18 for, related to, nor employed by any of the parties
19 to the action in which this deposition was taken,
20 nor financially or otherwise interested in the
21 outcome of the action.

22 
23 _____

24 TONIA L. TINKER, Notary Public
25

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